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D.C.; on behalf of Respondent.

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1 P R O C E E D I N G S

2 (11:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in case 10-6549, Reynolds v. United States.
5 Ms. Cain.

6 ORAL ARGUMENT OF CANDACE CAIN

7 ON BEHALF OF THE PETITIONER

8 MS. CAIN: Mr. Chief Justice, and may it
9 please the Court:

10 Recognizing that certain offenders convicted
11 before enactment or implementation of SORNA would be
12 unable to comply with SORNA's initial registration
13 requirement, Congress included section 16913(d)
14 delegating to the Attorney General the authority to
15 determine whether and how to apply SORNA's registration
16 requirements to those offenders.

17 Mr. Reynolds is one of those offenders
18 because he was convicted, sentenced and released from
19 prison a year before SORNA was enacted. But for a valid
20 exercise of the Attorney General's authority under
21 subsection (d), Mr. Reynolds had no obligation to
22 register SORNA, could not initially register under
23 SORNA, and therefore was not subject to SORNA's criminal
24 penalties. Action by the Attorney General was needed to
25 bring offenders like Mr. Reynolds into the new system,

1 and because those implementing SORNA, in determining
2 whether and how SORNA would be applied to pre-enactment
3 offenders, would require time and consideration,
4 Congress left the Wetterling Act registration law in
5 place for 3 years to ensure that all offenders would be
6 covered under the old law. And until --

7 CHIEF JUSTICE ROBERTS: Was the -- is the
8 Wetterling Act retroactive?

9 MS. CAIN: The Wetterling Act, Your Honor,
10 was remaining in place for 3 years and had a sort of a
11 sunset provision under --

12 CHIEF JUSTICE ROBERTS: No, no, I know.
13 That's going forward. But was the requirement to
14 register under the Wetterling Act, did that apply as of
15 the enactment date or did that reach back?

16 MS. CAIN: Your Honor, actually the
17 Wetterling Act was not effective for a year into the
18 future.

19 CHIEF JUSTICE ROBERTS: So you think it only
20 applied to that year?

21 MS. CAIN: No, I'm sorry. The Wetterling
22 Act was enacted in 1996.

23 CHIEF JUSTICE ROBERTS: So if the offense
24 were committed in 1994, did that person have to register
25 under the Wetterling Act?

1 MS. CAIN: They had to register, but there
2 were no criminal penalties. At that point it was a 1994
3 law called Wetterling, and 2 years after under the
4 Lychner Act criminal penalties were added.

5 Our reading better accords with the text and
6 congressional intent --

7 JUSTICE SOTOMAYOR: Could you clarify that
8 answer? The -- are you admitting that there were no
9 criminal enforcement options for the Attorney General
10 under the Wetterling Act for acts committed prior to
11 1996? Is that what you're saying?

12 MS. CAIN: Your Honor, the Wetterling Act as
13 it was enacted in 1994 was a registration requirement
14 without criminal penalties. In 1996 the Lychner Act was
15 enacted amending Wetterling and added a criminal
16 penalty, the Federal penalty of one-year punishment for
17 failure to register.

18 JUSTICE SOTOMAYOR: And that included all
19 individuals who had -- who had been convicted of sex
20 abuse acts before 1996?

21 MS. CAIN: I don't know.

22 Our reading better accords with the text of
23 SORNA and congressional intent, but the government
24 reading is simply not reasonable. If SORNA would apply
25 to all pre-enactment and pre-implementation offenders on

1 day 1, and the Attorney General could then modify in the
2 future, which would in fact -- in effect repeal SORNA as
3 to some offenders, then you could have a situation where
4 someone was convicted of an offense and then have to be
5 covered under SORNA, and then later the AG could decide
6 that that group was not required to register.

7 JUSTICE GINSBURG: Well, maybe -- maybe the
8 Attorney General doesn't have that power. But your
9 position is that whether this behavior, not registering,
10 is criminal or not, is left up to the Attorney
11 General -- is left up to the executive. Do we have
12 other examples where Congress says, well, we don't know
13 whether this should be a criminal offense, so we're
14 going to leave it to the Attorney General?

15 It's quite different to say the Attorney
16 General will implement it in the technical details, but
17 to say that whether it's a criminal offense or not is up
18 to the Attorney General, is there any other instance
19 where that's so?

20 MS. CAIN: Your Honor, I'm not aware of any,
21 but we don't -- this is not what the Attorney General is
22 doing. This is -- SORNA is a civil registration
23 requirement and the Attorney General's deciding whether
24 someone has to register. In order for a criminal
25 indictment to be brought, a person would have to travel

1 and then fail to register. So it's really not actually
2 deciding whether someone would be guilty of a crime or
3 convicted of a crime or exposed to a crime.

4 JUSTICE KENNEDY: I -- maybe I just don't
5 grasp the core of the case then. I thought this was a
6 criminal conviction and that you were arguing that it's
7 a criminal conviction because the conduct that's
8 prohibited by the statute was conduct that covered this
9 class of people by order of the Attorney General under
10 the interim regs. Is that wrong?

11 MS. CAIN: Your Honor, actually what we are
12 seeking is the ability to contest the Attorney General's
13 rule. We're saying --

14 JUSTICE KENNEDY: I'm asking, isn't this is
15 criminal conviction that resulted from the fact that
16 your client was within the class of persons covered by
17 the statute? The government says they are covered
18 anyway. You say they are covered only because the
19 Attorney General acted, but then you say it's a criminal
20 -- it's a civil provision? I -- I --

21 MS. CAIN: Well, Your Honor, it is --
22 failure to register and then travel -- I mean travel and
23 then fail to register after you are obligated under
24 SORNA to register is a crime, yes.

25 JUSTICE SCALIA: Well, I -- you know, my

1 problem is, that's very strange. I -- I find it very
2 strange to -- to leave it up to the Attorney General
3 whether something will be a crime or not. It will be a
4 crime if the Attorney General says so and it won't be a
5 crime if he doesn't. I mean, especially leave it up to
6 the Attorney General, for Pete's sake; he's the
7 prosecutor. You know, it will be a crime if the
8 prosecutor thinks it is and it won't be a crime if the
9 prosecutor thinks it isn't. I -- I don't know of any
10 parallel and -- and I -- I think it's -- it's sailing
11 close to the edge of unconstitutionality; whereas, what
12 the other side claims is simply, it's a crime to begin
13 with, but the Attorney General can make it not a crime.
14 That's sort of like prosecutorial discretion. In -- in
15 his -- in his judgment, if it shouldn't be a crime, you
16 know -- I have trouble with that, too.

17 JUSTICE SCALIA: But it's a lot closer to
18 prosecutorial discretion than -- than -- than what
19 you're asking us to accept, that something is a crime
20 only if the Attorney General says it's a crime. That
21 seems to me very strange.

22 MS. CAIN: Well, Your Honor, that's really
23 what the text says, and our reading -- but --

24 JUSTICE GINSBURG: But now we do -- the
25 Attorney General has spoken. The first time, you say it

1 was ineffective because there was no notice and comment.
2 But from -- what is it -- August of 1908, we have a
3 rule, a final rule, that did go through notice and
4 comment. So are we talking about, is this case simply
5 about the period from February 1907 to August 1908, and
6 that's -- that's all that's involved in this case, only
7 those people? Or are you contesting that after
8 August 1908, you still have some kind of claim?

9 MS. CAIN: Well, Your Honor, our case does
10 not involve the time period after August of 2008.

11 JUSTICE GINSBURG: So -- so this whole case
12 is about what happens between February '07 and August
13 '08, and that's the limit of it.

14 MS. CAIN: Right.

15 JUSTICE GINSBURG: Because there was no rule
16 at all before February '07 and there was a rule August
17 '08? So it's just that period this case is about?

18 MS. CAIN: Yes. Our client traveled in '07.

19 JUSTICE ALITO: It's the period from the
20 enactment of SORNA until the adoption of the SMART
21 guidelines, right? That's what we're talking about?

22 MS. CAIN: Well, Your Honor, if the SMART
23 guidelines are deemed valid, yes. That was -- in 2008.
24 Our client traveled in 2007. And so the Attorney
25 General's interim rule is the rule that would subject

1 him to criminal liability.

2 JUSTICE SOTOMAYOR: Excuse me. Let me go
3 back to that question, counselor -- to that answer.
4 Let's assume we accepted the Solicitor General's
5 understanding of the rule, that it was illegal to
6 travel -- that you had to be -- had to register from the
7 start of SORNA. What challenge do you have left either
8 to the interim rule in 2007 or to the final rules in
9 2008? What -- what challenge could you conceivably
10 make?

11 MS. CAIN: Your Honor, if the statute
12 applies from Day 1 we would still contest the interim
13 rule for -- the Attorney General took action but did not
14 exclude our client. The Attorney General did what he
15 was authorized to do --

16 JUSTICE SOTOMAYOR: What would be the basis
17 of that challenge?

18 MS. CAIN: Pardon me?

19 JUSTICE SOTOMAYOR: What would have
20 obligated him to take your client out of SORNA?

21 MS. CAIN: The exercise of his discretion to
22 not take him out --

23 JUSTICE SOTOMAYOR: Could you -- could you
24 tell me why?

25 MS. CAIN: Because --

1 JUSTICE SOTOMAYOR: What would be an abuse
2 of his discretion if he didn't take your client out?

3 MS. CAIN: Because he had exercised his
4 discretion under subsection (d) and decided not to
5 exclude our client from the --

6 JUSTICE SOTOMAYOR: But we're in a circular
7 argument.

8 MS. CAIN: Statute.

9 JUSTICE SOTOMAYOR: What would have
10 commanded him to take your client out?

11 MS. CAIN: It would be his discretion.

12 JUSTICE SOTOMAYOR: You -- you would have to
13 bring some sort of suit that said he abused his
14 discretion. On what basis would he have -- what would
15 be your claim of abuse other than, I really want my
16 client out?

17 MS. CAIN: Well, that he would have
18 standing. That's what we're trying to -- we're trying
19 to get standing to contest the interim rule.

20 JUSTICE SOTOMAYOR: But what impact would
21 the interim rules have had on you?

22 MS. CAIN: If the statute applied from Day 1
23 without the interim rule, we still would -- that is what
24 the standing issue is about. We're saying that the
25 interim rule is the only rule that gave -- gave the

1 Government the ability to include Mr. Reynolds in the
2 prosecution.

3 CHIEF JUSTICE ROBERTS: You have a notice --
4 notice and comment claim, right?

5 MS. CAIN: Yes. Yes, Your Honor.

6 JUSTICE GINSBURG: But what -- but what
7 you're challenging is interim rule, because there was no
8 notice and comment. So you would have had no challenge,
9 not from the date of SORNA's enactment, but from the
10 date of the rule that you're challenging -- and that
11 rule was February '07. Your challenge is to invalidity
12 of the interim rule, right?

13 MS. CAIN: That's right.

14 JUSTICE GINSBURG: Okay. So -- but before
15 there was an interim rule, you would have no such
16 challenge.

17 MS. CAIN: No, but the SORNA would not apply
18 to Mr. Reynolds before then.

19 JUSTICE GINSBURG: You might have some other
20 case, but this case is about a challenge to a rule as
21 invalid. That's -- that's -- as I understand it, so
22 that had to be a rule in order for you to make the
23 challenge.

24 MS. CAIN: I'm sorry, I missed the last
25 part.

1 JUSTICE GINSBURG: You are challenging the
2 -- the Attorney General's first rule as invalid, the
3 February '07 rule. You say --

4 MS. CAIN: That's right.

5 JUSTICE GINSBURG: You say it's invalid
6 because there was no notice and comment. You have no
7 challenge -- your challenge doesn't reach before that,
8 because there was no rule before that. So that you can
9 -- the earliest point is when the rule was adopted,
10 you're saying the rule was invalid. So that's why I
11 said the brackets are from when there was an allegedly
12 invalid rule, which was in February '07, until when
13 there's a valid rule, which is in August of '08.

14 MS. CAIN: That's right, Your Honor. I mean
15 --

16 CHIEF JUSTICE ROBERTS: No, that's not. No.
17 Your argument as I understand it is there was no notice
18 and comment when he issued the interim rule.

19 MS. CAIN: Right.

20 CHIEF JUSTICE ROBERTS: If there had been
21 notice and comment, you would have jumped in with
22 comments that would have convinced the Attorney General
23 not to apply the rule to your client.

24 MS. CAIN: That's right.

25 CHIEF JUSTICE ROBERTS: Okay.

1 JUSTICE SCALIA: And your argument is
2 further that without the rule, SORNA doesn't exist,
3 right?

4 MS. CAIN: For our client.

5 JUSTICE SCALIA: Right.

6 MS. CAIN: He is unable to comply with the
7 initial registration provision under (b) because he was
8 released from prison a year before SORNA was enacted, so
9 he could not meet either one of the descriptions of
10 initial registration.

11 JUSTICE BREYER: That doesn't mean -- that
12 doesn't mean SORNA doesn't apply, it means 2250 didn't
13 apply.

14 MS. CAIN: That's right.

15 JUSTICE BREYER: Is it that right.

16 MS. CAIN: Well --

17 JUSTICE BREYER: It might be a metaphysical,
18 but it may be that Congress intended the statute to
19 apply to people like your client, but the question is
20 when the initial registration has to take place, and I
21 took you as saying until the Attorney General acts, we
22 don't know, so 2250 doesn't -- doesn't criminalize a
23 failure until he can know when he's supposed to
24 register.

25 MS. CAIN: Register under SORNA, that's

1 right.

2 JUSTICE BREYER: That's right. Okay.

3 MS. CAIN: The problem is here that the
4 prosecution -- the Attorney General's office is
5 substituting a state registration for the initial
6 registration under SORNA, and that's just not what the
7 text says.

8 JUSTICE KAGAN: Ms. Cain, why do you think
9 Congress would have written the text in this way? You
10 said it was very complicated and Congress was worried
11 about different problems, the way different
12 registrations overlapped on each other but exactly
13 what was so complicated? Why couldn't Congress just
14 have applied the statute to people in Mr. Reynold's
15 situation itself?

16 MS. CAIN: Well, even the government agrees
17 in their brief that there are complications.

18 JUSTICE KAGAN: I was going to ask the
19 government the same question. What are the
20 complications that Congress was so worried about?

21 MS. CAIN: Some sex offenders, you know,
22 from the various states, there were state laws that were
23 varied amongst each other, and there was a federal
24 Wetterling Act that had its own periods of registration
25 and different requirements. And I think that, um, one

1 of the permutations, some of them are that some sex
2 offenders never had to register in some states; some had
3 been convicted before and had served out their time and
4 no longer had to register; and some were released from
5 prison, you know, before the enactment or implementation
6 of SORNA. And an example of a permutation that
7 was going to have some cloth for consideration is the
8 one that's sort of an example in a different context, in
9 the federal register and in the government's brief which
10 is that certain people who had served their time and
11 were completely out of the system, if they got re-
12 arrested for a misdemeanor, the Attorney General decided
13 that those individuals did not have to register for a
14 state to be deemed substantially implemented with
15 respect to SORNA. And so that's an example of a type of
16 decision, a complication that the Attorney General was
17 particularly well-suited to deciding in making that
18 determination.

19 JUSTICE SOTOMAYOR: Arrested for a
20 misdemeanor to do what?

21 MS. CAIN: Any arrest for a misdemeanor that
22 would bring a previous offender back in the system, if
23 that person was just convicted of a misdemeanor, they
24 would not -- the state would not have to re-register
25 them in order to be deemed substantially compliant with

1 SORNA and get the firm grant money.

2 JUSTICE SOTOMAYOR: I thought Justice
3 Kagan's question was, what would have stopped Congress
4 from just saying: You have to register on the day of
5 passage. There was nothing to stop Congress from doing
6 that, correct?

7 MS. CAIN: They could have done that, but
8 they were concerned about how you get the older
9 conviction, the older pre-enactment people into the new
10 system.

11 JUSTICE SOTOMAYOR: That's your reason for
12 why they didn't do that. They didn't make it automatic,
13 correct? That's your argument?

14 MS. CAIN: Right. They wanted to have a new
15 registration, a new system that would start from a
16 certain point that would bring in new requirements. And
17 the problem is how to get the people with the older
18 convictions and the older registrations into the system.
19 And that would be done with initial registration. But
20 Mr. Reynolds --

21 JUSTICE KAGAN: Well, why is -- Why is it
22 easier for the Attorney General to do that by regulation
23 than for Congress simply to do it by the statute itself?
24 What did they expect to happen in the regulatory process
25 that would solve these problems for them?

1 MS. CAIN: Well, I think that it's more
2 flexible to have a regulation, and takes perhaps less
3 time than legislation to think of all the different
4 permutations. They don't know every state's laws and
5 every state's capabilities. And so it was more
6 flexible. And they could respond more quickly to
7 changes.

8 JUSTICE GINSBURG: Well, it seems-- Is this
9 case -- What would compliance entail other than simply
10 telling the Missouri authority that he had to register,
11 was registered in Missouri, telling Missouri authority
12 that he was moving to another state. That's all he had
13 to do, right, to comply?

14 MS. CAIN: Comply with Missouri's law? The
15 state law?

16 JUSTICE GINSBURG: To comply with the SORNA
17 requirement, that he would have to tell the Missouri
18 authority that he was moving to another state. And then
19 Missouri would have an obligation to tell that other
20 state he's there.

21 MS. CAIN: Well, Your Honor, that's-- Your
22 question assumes that state registration would suffice
23 for SORNA. And respectfully, the--SORNA was not enacted
24 until --

25 JUSTICE GINSBURG: But I'm talking about

1 SORNA has been enacted, and now he's moving after SORNA
2 is enacted, right?

3 MS. CAIN: Right. Well that's --

4 JUSTICE GINSBURG: Okay. So SORNA is on the
5 books. He's registered in Missouri. He's leaving the
6 state to comply with SORNA. What does he have to do
7 other than tell the original state: I'm moving to
8 another state?

9 MS. CAIN: Well, he would have to comply
10 with the requirements of initial registration under
11 SORNA. Those contain more requirements than under the
12 Missouri --

13 JUSTICE GINSBURG: Well, he can't comply
14 with the initial registration because he committed a
15 crime even before SORNA was enacted.

16 MS. CAIN: I'm just --

17 JUSTICE GINSBURG: But now, what would he
18 have to do to be in compliance --

19 MS. CAIN: With Missouri law, with state
20 law, would be to comply with Missouri law tell Missouri
21 he is leaving and then go to Pennsylvania and comply
22 with Pennsylvania law, perhaps. And that's also not a
23 SORNA registration; that's a registration under state
24 law.

25 We know from Carr that SORNA is-- doesn't

1 create an obligation until the statute's effective date.
2 And the statute's effective date is after a valid
3 Attorney General regulation for purposes of people like
4 Mr. Reynolds.

5 JUSTICE KAGAN: Could you tell me this, Ms.
6 Cain. You may have said this, and I may just have
7 missed it. But under the new regulations, a man who's
8 in the position of your client and who cannot initially
9 register under (b), b just doesn't fit his
10 circumstances, does he now have to initially register
11 again, or does his initial registration stick and he
12 just has to update it when he moves?

13 MS. CAIN: The initial registration under
14 SORNA could be updated. The state registration that he
15 may have already done in the past is not a SORNA
16 registration. He would have to register initially
17 again, and that is a new registration. And that would
18 be what Congress intended, because their goal was to not
19 have a patchwork of regulations and rules. So it would
20 be a new registration, but an update of a SORNA
21 registration is certainly possible, yes.

22 JUSTICE GINSBURG: Under the current
23 regulation, under the 19 -- I mean the '08 regulations,
24 wouldn't be enough to comply for somebody in his
25 situation, to comply simply by telling his parole

1 officer: I'm moving to the other state, under the
2 regulation that says how this is implemented?

3 MS. CAIN: Actually, Your Honor, no. We
4 actually don't know the answer to that question, because
5 the Attorney General has not issued regulations
6 instructing offenders what to do. They have simply
7 issued guidelines telling the states what they can do to
8 substantially implement SORNA. So we don't really know
9 the answer to that question.

10 The point is that the requirement to
11 initially register under SORNA was not effective until
12 the Attorney General -- could not be effective until the
13 Attorney General said so. And that's what the statute
14 says under (d). And that if you look at how the
15 government is reading the statute, you apply it from day
16 one, but yet they have the ability to modify SORNA,
17 which in effect means to repeal SORNA's effect as to
18 someone in the future. That also would cause a lot of
19 complications, especially in the context I mentioned
20 where someone with a misdemeanor, you know, may be part
21 of the group that doesn't have to register in the
22 future, but they had to at some point, and--

23 JUSTICE SOTOMAYOR: Let's -- Is there
24 anything -- If I understand the Solicitor General's
25 position, all your client had to do after SORNA was

1 passed was after a reasonable amount of time, or upon
2 his travel, to tell Missouri, which was his state of
3 conviction, that he was moving. Correct?

4 MS. CAIN: If you-- They say that he was not
5 part of the people that could register within a normal,
6 I mean, a reasonable amount of time because of the state
7 registration.

8 JUSTICE SOTOMAYOR: Right.

9 MS. CAIN: But assuming that that wasn't the
10 case, assuming he was, you know, just--

11 JUSTICE SOTOMAYOR: No, I'm not assuming
12 that.

13 MS. CAIN: Okay.

14 JUSTICE SOTOMAYOR: Would he have been in
15 compliance with SORNA under the final rules today, the
16 interim rules when they were passed, or on the date that
17 he left if he had when he traveled, or a reasonable time
18 thereafter, told his state of conviction that he had
19 moved? Would that have been enough?

20 MS. CAIN: No, Your Honor.

21 JUSTICE SOTOMAYOR: What does he have to do
22 in addition to that under the interim or final rules?

23 MS. CAIN: We don't know. Because, again,
24 the Attorney General has not issued regulations or
25 guidelines telling offenders what to do. They have only

1 issued guidelines telling jurisdictions how they can
2 substantially implement SORNA. So it's not as though --
3 He cannot register under SORNA until the Attorney
4 General specifies that he --

5 JUSTICE GINSBURG: That was the answer that
6 you gave to my question, which was the same thing: Why
7 isn't it sufficient now for him simply to tell his
8 parole officer he's moving.

9 MS. CAIN: Oh, sorry. Yes. It would not be
10 sufficient. I mean, it -- he has to initially register
11 to register under SORNA. And he can't do that until the
12 Attorney General issued a valid rule, which -- we are
13 contesting that the 2007 rule is not valid. We're
14 saying that our client has standing to make that
15 challenge; we were denied the ability to do that below.
16 And I would like to reserve my time if there's no
17 further questions.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.
19 Ms. Sherry.

20 ORAL ARGUMENT OF MELISSA ARBUS SHERRY

21 ON BEHALF OF THE UNITED STATES

22 MS. ARBUS SHERRY: Mr. Chief Justice, and
23 may it please the Court:

24 If I could start by answering your question,
25 Your Honor, about the Wetterling Act, it was not

1 retroactive. It did not apply to pre-enactment conduct.
2 It defined a sex offender, unlike SORNA, as somebody who
3 is convicted of a sex offense, and in guidelines issued
4 after Wetterling and after several subsequent amendments
5 to the Wetterling Act, the Attorney General interpreted
6 it as only requiring States to register offenders that
7 are convicted not only post-enactment, but
8 post-implementation by the State. And one such cite
9 is --

10 JUSTICE SCALIA: Post what?

11 MS. ARBUS SHERRY: Post-implementation by
12 the States. And so 61 Federal Register cite 15112 is
13 just one example of that type of regulation. And so
14 when Congress enacted SORNA, it switched from "is
15 convicted" to "was convicted" in order to include
16 pre-enactment offenders.

17 Justice Kagan, to get to your question about
18 why is it all so complicated, our answer is that it
19 really is not. There is no reason why it couldn't have
20 applied on day 1 to all pre-enactment and
21 pre-implementation offenders. And to start off, when
22 you look about all pre-enactment and
23 pre-implementations, this is an incredibly large class.
24 There is existing sex offenders on day 1 and all
25 existing sex offenders from many months and years going

1 forward while the States proceed towards implementation.

2 JUSTICE BREYER: So why --

3 JUSTICE KAGAN: But then as I indicated.

4 Why would Congress have given you the authority to
5 exempt people? It seems to me that the -- the burden is
6 on you in the exact same way it is on Ms. Cain.

7 MS. SHERRY: In our view, what subsection
8 (d) was, essentially, was a safety valve. It wasn't
9 something that Congress thought the Attorney General was
10 going to need to use, but it was something that was
11 there for the Attorney General should problems arise in
12 the course of implementation.

13 JUSTICE ALITO: What would happen in -- in
14 this situation: Someone is convicted of a sex offense
15 before SORNA is enacted; the shortly after the statute
16 is enacted the person moves to a new State, does not
17 register; then after that the Attorney General
18 exercising the authority that you say he has under --
19 exercising -- excuse me, exercising the authority under
20 subsection (d), determines that SORNA shouldn't apply to
21 people who were convicted of offenses before its
22 enactment? Would that person have committed a criminal
23 offense?

24 MS. ARBUS SHERRY: I think at the -- at the
25 time he acted, yes. I suppose the Attorney General

1 could decide whether or not he is going to apply his
2 regulation prospectively or retrospectively. But I
3 think the important point is the same result is reached
4 under Petitioner's view.

5 In Petitioner's view, the Attorney General
6 has full and complete control of the light switch.
7 Congress didn't do anything, simply left it for the
8 Attorney General to simply turn the lights on. We don't
9 think that's right for a number of different reasons,
10 one of which is the way Congress that delegated
11 authority to Attorney General in subsection (d). If --

12 JUSTICE ALITO: Well, if Congress wasn't
13 sure whether it wanted -- whether it was appropriate to
14 apply SORNA retroactively, and -- I just -- and
15 therefore was willing to leave that to the Attorney
16 General, then I don't understand why it would have made
17 the Act applicable immediately upon enactment --

18 MS. ARBUS SHERRY: Our --

19 JUSTICE ALITO: -- pending a determination
20 by the Attorney General.

21 MS. ARBUS SHERRY: Our understanding is that
22 Congress did know that it wanted to include as a general
23 matter all pre-enactment -- and again, not pre-enactment
24 but pre-implementation offenders as -- offenders as
25 well, and I think we know that because when you look to

1 the provisions that actually speak to what a sex
2 offender was required to do under the Act -- and there
3 are six such provisions -- they all start the same way;
4 they say that the sex offender shall do something. And
5 it defines the sex offender as somebody who was
6 convicted.

7 When you look at all six of those provisions
8 on their face, they apply to all sex offenders so
9 defined without any qualification. And Petitioner's
10 view is that despite that clear language, despite the
11 lack of any qualification within those provisions, by
12 virtue of subsection (d) what Congress is really saying
13 is that nobody has to register until the Attorney
14 General says otherwise.

15 JUSTICE BREYER: Well, so --

16 JUSTICE SOTOMAYOR: So how do they know
17 where to register? Do you agree with your adversary
18 that -- that they have to register under SORNA?

19 MS. ARBUS SHERRY: No, they don't have to
20 register under SORNA.

21 JUSTICE SOTOMAYOR: So how were they
22 supposed to know when or how they would register until
23 the Attorney General acted?

24 MS. ARBUS SHERRY: So, if I could break it
25 up into a few classes. Again, we are talking about

1 pretty much -- actually we are talking about everybody
2 on day 1. And for a number of pre-enactment and
3 pre-implementation offenders, they are still going to be
4 in prison on the day that SORNA was enacted.

5 JUSTICE SOTOMAYOR: I'm not talking about
6 those people.

7 MS. ARBUS SHERRY: Okay.

8 JUSTICE SOTOMAYOR: Not the people who can
9 comply with (b).

10 MS. ARBUS SHERRY: Okay.

11 JUSTICE SOTOMAYOR: I'm talking about the
12 people --

13 MS. ARBUS SHERRY: The people in the second
14 group I was going to talk about are offenders like
15 Reynolds, who have already registered before SORNA was
16 enacted. They are already initially registered. It's
17 the very same State registry system that's created --
18 that's SORNA. There is no creation of any SORNA
19 registry and the statute itself doesn't talk about a
20 SORNA compliant registry. To the contrary, it defines a
21 sex offender registry in 16911, subsection 9. It's on
22 page 10A of our brief. It defines a sex offender
23 registry as a registry of sex offenders maintained by a
24 jurisdiction.

25 So these are the same registries that have

1 been in existence in all 50 States for the last decade.
2 So offenders like Reynolds don't have to do anything
3 under (b); (b) simply doesn't apply to them. They do
4 however as I pointed out have to comply with the other
5 provisions. They do have to do what (c) requires, which
6 is when Reynolds moved from Missouri to Pennsylvania, he
7 had to tell somebody. That is what (c) requires; it's
8 what he was required to do even before SORNA was
9 enacted; and what Congress did with respect to the
10 subset of sex offenders that haven't already registered
11 before SORNA but that need to get on the registry --
12 afterwards, because, for example, their sex offense
13 wasn't covered before SORNA.

14 CHIEF JUSTICE ROBERTS: So your -- your
15 argument is that requirements in the heading for 42
16 U.S.C. 16913, Registration Requirements For Sex
17 Offenders, means something different than requirements
18 in subsection (d), which the Attorney General can issue
19 rules about, because you are saying although there is
20 the requirement that they register and comply with (c)
21 and all those other things, when it says that the
22 Attorney General can issue regulations specifying the
23 applicability of the requirements of this subchapter,
24 that only meant the administration -- you know,
25 provisions, not the general requirement that you

1 register and keep current and all that?

2 MS. ARBUS SHERRY: No, I don't think that
3 that is what we are saying. What we view (d) is,
4 essentially, is a safety valve. It does give the
5 Attorney General that authority with respect to
6 requirements, going but going forward Congress has set
7 the baseline; Congress has set the default --

8 CHIEF JUSTICE ROBERTS: It's a safety valve
9 to release what?

10 MS. ARBUS SHERRY: To release sex offenders
11 if needed to -- to perhaps suspend certain registration
12 requirements. And let me give a couple of examples.

13 CHIEF JUSTICE ROBERTS: You are talking
14 about sort of in the weeds, the little details, not the
15 underlying requirement of registration, right?

16 MS. ARBUS SHERRY: No, I think it -- I think
17 arguably it could be both. Again I don't think this is
18 something that Congress thought the Attorney General was
19 necessarily going to have to exercise, and in fact the
20 Attorney General has not done so.

21 JUSTICE KAGAN: But does that mean, Ms.
22 Sherry, that -- that the Attorney General could if he
23 wanted to, for whatever reason, could exempt all
24 pre-enactment offenders from SORNA?

25 MS. ARBUS SHERRY: I think as a theoretical

1 matter, on its face, the delegation of authority in (d)
2 is -- is quite broad and plenary. But I --

3 JUSTICE KAGAN: It would allow that. So
4 when you say it gave the Attorney General the ability to
5 confirm or modify the requirement in section (a), you
6 mean he could if he wanted to exempt all pre-enactment
7 offenders?

8 MS. ARBUS SHERRY: Again, I say in theory
9 because I think like all delegations of authority, the
10 Attorney General is certainly limited to acting in
11 furtherance of the purpose of Congress, and here we know
12 the --

13 JUSTICE SCALIA: We had a case involving the
14 meaning of modify, and it doesn't -- doesn't mean
15 repeal. So he presumably couldn't suspend the whole
16 thing.

17 MS. ARBUS SHERRY: I -- I -- I do know what
18 case you are talking about and I have read it, and
19 that's certainly true.

20 JUSTICE KAGAN: To confirm --

21 CHIEF JUSTICE ROBERTS: You want to share it
22 with the rest of us?

23 MS. ARBUS SHERRY: I'm not saying I
24 definitely remember the name. I think it was MCI, but I
25 -- I do know the case you are talking about. I mean

1 here the word is specify as opposed to modify, and I
2 guess there could be an argument --

3 JUSTICE SCALIA: It authorized the FCC to
4 modify the requirement to post rates, and the FCC simply
5 eliminated the requirement to post rates, and we said
6 that that was no good.

7 MS. ARBUS SHERRY: And -- and I -- I suppose
8 a similar argument could be made with respect to
9 specify. I don't think it necessarily has to be --

10 JUSTICE BREYER: Leaving the language aside,
11 I would like to go back to what Justice Sotomayor was
12 asking. We are talking, it seems to me, about section
13 2250. He was a convicted of violating criminally that
14 section. So I have no problem about the statute
15 applying to all these people; it's a question of how it
16 applies.

17 Imagine with me that we have an individual
18 who was convicted a year ago, and sentenced to a 5-year
19 term. Does the statute apply to him?

20 MS. ARBUS SHERRY: He was convicted a year
21 ago?

22 JUSTICE BREYER: Yes, correct.

23 MS. ARBUS SHERRY: -- of a sex offense?

24 JUSTICE BREYER: Yes, correct.

25 MS. ARBUS SHERRY: In our view the statute

1 does apply.

2 JUSTICE BREYER: Of course it does. Of
3 course it does.

4 Now he hasn't registered yet. He is in jail
5 for 4 more years. So has he violated 2250 so far?

6 MS. ARBUS SHERRY: He has not.

7 JUSTICE BREYER: No? Thank you.

8 So a person who has recently -- recently
9 committed the crime, is in prison, is under an
10 obligation to register, is yet not in violation because
11 of the time for initially registration -- registering --
12 has not yet expired. Now let's go back to a person who
13 is far less certain how it applies. He committed the
14 crime 10 or 15 years ago. He has long since been
15 released from prison. There are, as you point out,
16 several categories. One is a person who has to -- who
17 should under Michigan State law register, but he didn't.
18 Another is a person who did, and moved. You know, there
19 are several categories. Now, is he in violation of
20 2250? Your point is he is immediately, even though it
21 was much less clear that it applied to him, much less
22 clear. And much less clear -- in fact, it doesn't say
23 when he is supposed to register, but still, 2250 applies
24 to him.

25 I just wonder how that could be,

1 particularly when we have three sentences, indeed, which
2 seem to me to tell the Attorney General, certainly,
3 please deal with that kind of a case.

4 MS. ARBUS SHERRY: If I could start with
5 2250 and then go back to subsection (d), that is not our
6 position. 2250 is the criminal provision. What we were
7 actually looking at here are the registered --

8 JUSTICE BREYER: I thought he was convicted
9 of a crime. I thought he was convicted of a crime under
10 2250. That's why I asked the question. And his lawyer
11 said in response to my question that one of the things
12 she wants to argue is that he cannot be convicted under
13 2250 until he is under a legal obligation to register,
14 and that initial registration is not a legal obligation
15 until the Attorney General makes his rules. I thought
16 that was the argument.

17 MS. ARBUS SHERRY: Let me make an important
18 distinction. We're actually talking about Reynolds
19 here. You are right, but Reynolds was not convicted and
20 was not prosecuted for failing to comply with the
21 initial registration requirements in subsection (b); he
22 was convicted and prosecuted for failing to comply with
23 the timing requirements in subsection (c), which are
24 point clear as applied to offenders like Reynolds, who
25 have already registered or already in the system.

1 What he did was he traveled --

2 JUSTICE BREYER: That says -- subsection (c)
3 says he has to -- not later than 90 days --

4 JUSTICE SCALIA: Where is this? Do you want
5 to tell us where it is?

6 MS. ARBUS SHERRY: I'm sorry. This is on
7 12(a) of the summary --

8 JUSTICE SCALIA: It's very helpful to know
9 what you're talking about.

10 MS. ARBUS SHERRY: Absolutely.

11 JUSTICE KAGAN: But you're suggesting, Ms.
12 Sherry, that (b) and (c) have nothing to do with each
13 other, and in fact, one can read (a); (b), and (c) as
14 all integrally linked and referring only to
15 postenactment offenders, so (a) is the umbrella
16 provision; it says "a sex offender shall register and
17 keep the registration current." (B) says how you shall
18 register initially, and (c) says how you shall keep that
19 registration current. So all three of these refer only
20 to postenactment offenders. And then (d) comes along
21 and says, by the way, the Attorney General can apply all
22 of this to pre-enactment offenders as well, and can
23 specify how to do that.

24 MS. ARBUS SHERRY: Again, I don't think
25 that's right. And if it helps, I'd like to walk through

1 the different provisions. The one thing I would say on
2 the outset, however, is when you say that, when you read
3 those sections, you can read them as applying to only
4 postenactment offenders, I don't think that's right,
5 especially because of subsection (b), because on the day
6 that SORNA was enacted, every single person in prison at
7 that time was by definition a pre-enactment offender,
8 and so on its face when you read subsection (b), it
9 quite easily applies to quite a number of pre-enactment
10 offenders.

11 And the other point I would make along those
12 lines is that fact subsection (b) just doesn't talk
13 about pre-enactment, it talks about pre-implementation
14 offenders. So offenders that were convicted after
15 SORNA's enactment but before SORNA was implemented,
16 again quite easily fit not only within subsection (b)
17 but within all the other subsections as well. And with
18 respect to the interrelationship between them, I think
19 subsection (a) really identifies the jurisdiction in
20 which a defendant needs to register.

21 So the first instance the jurisdictions in
22 which an offender both needs to register and to keep the
23 information current. Subsection (b) really serves a
24 limited purpose. It's an intake process. It's getting
25 an offender into the system. For offenders like

1 Reynolds who are already in the very same system, there
2 is nothing to be done. (B) simply doesn't apply to
3 them. (B) is applied to people who are not already in
4 that system, and for those that can comply with the
5 timing, it gets them in before their release to the
6 community. But the inability to comply with subsection
7 (b) for the small set of offenders that cannot comply
8 were with the timing requirements, it doesn't immunize
9 them from complying with all the other registries --

10 JUSTICE BREYER: In other words, you were
11 reading (c) as saying, to go back to my example, the
12 person who was convicted last year and has four more
13 years to do his initial registration -- nonetheless, if
14 he changes his name, if he stops being a student while
15 in prison, he has to register tomorrow or the day after.
16 I would say if that's your reading of those two
17 sections, it's going to confuse everybody who is in
18 prison, as it did confuse me.

19 MS. ARBUS SHERRY: That is not my reading of
20 the --

21 JUSTICE BREYER: Alright, then. Then I take
22 it your reading is he does not have to fulfill (c) until
23 after he has to initially register, and so we're back to
24 the question of why you treat somebody who committed the
25 crime long ago with less clarity -- with less time to

1 initially register, with more confusion from one
2 jurisdiction to another than you would treat a person
3 who was convicted last year, is still in jail, and has
4 four more years to register. That's why I read (d) as
5 trying to sort that kind of thing out.

6 MS. ARBUS SHERRY: Two points on that.
7 Number one, for offenders like Reynolds that are already
8 registered, there's nothing more to be done as far as
9 registration goes. All that he needs to do is to keep
10 the information current and to keep it updated. The
11 other point I would make, since we're talking about
12 2250, Congress provided other protections for offenders
13 that were unable to comply with the timing requirements,
14 number one -- it provided impossibility affirmative
15 defense in 2250(b), and the other thing that Congress
16 did is it required that any failure to register in order
17 to be subject to prevailing sanctions, that it be a
18 knowing failure to register. In other words, that the
19 offender know he has a registration requirement and know
20 that he is not complying with that requirement. So the
21 idea that there are some hypothetical or maybe even not
22 so hypothetical sex offenders out there who can't comply
23 with the precise timing in (b) and will -- have no idea
24 what they are required to do, they are not going to be
25 criminally liable under 2250 because there is an

1 impossibility defense. And to the extent they don't
2 know that they have a registrational requirement,
3 they're also not going to be criminally liable under
4 2250.

5 And so --

6 CHIEF JUSTICE ROBERTS: Why isn't part of
7 your answer to Justice Breyer's question that the one
8 person who doesn't have to register for four years is in
9 prison already, so presumably, he doesn't present the
10 same type of threat that led to the enactment of these
11 registration laws in the first place.

12 MS. ARBUS SHERRY: That's absolutely right.
13 The reason -- the release from prison is the trigger and
14 the concern and the reason we have registration is for
15 periods of time where these offenders are released into
16 the community. And that's why the timing requirement in
17 (b) is there. The notion is that before offenders are
18 released into the community, we want to get them on the
19 registry rolls, we want to be able to track them from
20 the day that they're released.

21 JUSTICE BREYER: Your view is that they have
22 to register initially when?

23 MS. ARBUS SHERRY: If they have not?

24 JUSTICE BREYER: No, no, I'm saying -- take
25 my example. The person is in Michigan. Michigan does

1 have a sex registration thing, but he never actually
2 did, so now the Federal act comes in now when is he
3 supposed to register.

4 MS. ARBUS SHERRY: He is to register within
5 a reasonable time.

6 JUSTICE BREYER: Oh, reasonable time and
7 what is a reasonable time.

8 MS. ARBUS SHERRY: Given the rest of the
9 requirements something probably along the lines of give
10 or take three business days.

11 JUSTICE BREYER: Three business days he's
12 supposed to go out and do that and if he doesn't do that
13 he has committed a federal crime which makes no mention
14 of it, no mention at all, and he's just supposed to
15 guess that that's three business days because he's a
16 lawyer, is that why?

17 MS. ARBUS SHERRY: No, actually it's not
18 unique with respect to the statute, it's quite common
19 for status offenses, and let me try to give one example.
20 One of the statutes that the Court looked at fairly
21 recently 922 g 9 makes it unlawful to possess a fire arm
22 after having a conviction for a misdemeanor crime of
23 domestic violence. That statute applied in 1996 and
24 applies to everybody convicted of a domestic violence
25 offense. So if an individual had domestic violence

1 conviction in 1990 and had a fire arm in his possession
2 forever the last 20 years when the statute passed in
3 1996 he was in violation of the statute. Of course he
4 couldn't be prosecuted unless he was given some
5 reasonable time to get rid of the fire arm. But there
6 is nothing years ago with respect to that. And again,
7 the criminal provision here 2250 provides additional
8 protections it has an affirmative defers for
9 impossibility and it requires that there be knowledge.
10 So for an offender that knows he is required to register
11 he is given a reasonable amount of time to come into
12 compliance with that registration requirement. Reynolds
13 in particular is an example of what Congress was trying
14 to get at. Reynolds knew he was required to tell
15 somebody when he moved from Missouri to Pennsylvania.
16 He knew that because he signed registration forms in
17 Missouri telling him as much. And those are in the
18 joint appendix after pages 16.

19 JUSTICE GINSBURG: Those were under Missouri
20 law not under federal statute.

21 MS. ARBUS SHERRY: They were -- they were
22 under Missouri law, but the important point for SORNA
23 purposes is that he knew he had a registration
24 requirement. He doesn't have to know what law it arises
25 under. And again, the sex offender registries that

1 pre-existed SORNA are the exact same sex offender
2 registries that SORNA is using.

3 SORNA was enacted in 2006; it wasn't
4 starting over; it wasn't starting from scratch. It
5 wanted to build on the previous regime. It wanted to
6 fix it and make it better and fill in gaps and fill in
7 loopholes and stitch all of the -- -

8 CHIEF JUSTICE ROBERTS: And providing
9 criminal penalties that weren't always there.

10 MS. ARBUS SHERRY: Well, the criminal
11 penalties --

12 CHIEF JUSTICE ROBERTS: That's a big change.

13 MS. ARBUS SHERRY: The criminal penalties --
14 the Federal felony criminal penalties were not there
15 before. Wetterling did have a misdemeanor penalty, and
16 a number of States did have penalties, but again the
17 criminal penalty is distinct from the registration
18 requirement, which is what we are actually looking at
19 and what we're interpreting.

20 The registration requirement, violation of
21 which can result in criminal penalties in certain
22 circumstances; but again, Congress provided additional
23 protections for those circumstances. The registration
24 requirements themselves not only apply to sex offenders
25 and tell sex offenders what they are required to do, it

1 also tells States and other jurisdictions what they are
2 required to do if they want to -- implement.

3 CHIEF JUSTICE ROBERTS: Your theory -- your
4 theory of what the Attorney General did here, as you put
5 in your -- I forget what, the regulations, or the -- was
6 confirm the applicability of SORNA, right?

7 MS. ARBUS SHERRY: Our --

8 CHIEF JUSTICE ROBERTS: That's the word you
9 used, I think, on page 12 of your brief.

10 MS. ARBUS SHERRY: We did. One of the
11 things he did was confirm. In the interim rule the
12 Attorney General in the preamble section read the
13 statute exactly as we read the statute.

14 CHIEF JUSTICE ROBERTS: Right. What is the
15 other example -- did you have any other example where an
16 Attorney General confirms the applicability of a
17 criminal law?

18 MS. ARBUS SHERRY: I don't know if I would
19 say confirm. There are certainly are other examples
20 where the Attorney General has had authority and
21 exercised authority to define certain aspects of
22 criminal law, Touby is one example of such a case.

23 CHIEF JUSTICE ROBERTS: No, that's
24 different. I mean if you are talking about defining
25 which drugs are qualified, you know, under provisions

1 that criminalize possession, things like that. That's
2 is clarification going forward. I am talking about
3 straightforward confirming, is what you say happened
4 here.

5 MS. ARBUS SHERRY: Oh, well --

6 CHIEF JUSTICE ROBERTS: The law says this
7 and I -- I think it means -- I think it means what you
8 say it means.

9 MS. ARBUS SHERRY: I think there are a
10 number of examples where for example, agencies do little
11 more than restate what the statute says. I think the
12 Court doesn't give deference in those circumstances, but
13 it certainly is within the scope of the general
14 authority of an agency or the Attorney General in this
15 case to reiterate the statute's requirement.

16 The Attorney General went -- went a step
17 further in the interim rule in that what the Attorney
18 General said in the preamble is I read the statute as
19 written; I think it applies facially to all sex
20 offenders regardless of the date of conviction but I
21 understand the defendants are making an argument to the
22 contrary, and in an abundance of caution to foreclose
23 that argument to the extent I need to do something under
24 subsection (d) I am doing it now; and I'm saying that
25 yes, it applies to all pre-enactment and

1 pre-implementation offenders.

2 CHIEF JUSTICE ROBERTS: So I get back to my
3 question, which -- what's your best example of an
4 Attorney General doing something like that?

5 MS. ARBUS SHERRY: Confirming? I don't know
6 if I have one in a criminal context exactly, but I think
7 the point maybe that Your Honor's getting at; and you
8 can certainly correct me if I'm wrong; might be a point
9 that you made earlier. It certainly is somewhat unusual
10 delegation of authority to the Attorney General. If
11 Congress had wanted the Attorney General to decide
12 whether or not the registration requirements at the very
13 core of this statute had any operative effect going
14 forward, presumably it would have told the Attorney
15 General that he needed to do something.

16 That's something that Congress did in many
17 other provisions of SORNA where Congress said the
18 Attorney General shall do something. In fact, more than
19 a dozen provisions Congress used that language to direct
20 the Attorney General to take a certain action.

21 CHIEF JUSTICE ROBERTS: Well, here it says
22 shall. It says the Attorney General shall have the
23 authority to specify the applicability of the
24 requirements of this subsection.

25 MS. ARBUS SHERRY: But it says shall have

1 the authority. And I think there is a significant
2 difference between shall specify and shall have the
3 authority to specify. The latter is a passive
4 delegation of authority; it's a permissive delegation.
5 It suggests that the Congress did not think that the
6 Attorney General had to do something for the statute to
7 apply as written. It suggests that the statute applied
8 on day 1 to all pre-enactment and pre-implementation
9 offenders as all the other subsections that set forth
10 the registration requirements suggest, but if the
11 Attorney General in the future sees a need to specify
12 the applicability going forward, then he has the
13 authority to do that. Not that he --

14 JUSTICE SOTOMAYOR: But the question -- you
15 are starting from a proposition, counsel, it seems to
16 me, that Congress necessarily and under all
17 circumstances thought that it had to include pre-SORNA
18 convictions. But I don't know -- yes, it wanted a
19 uniform system, but it had State systems in place, it
20 had an imperfect Wetterling Act in place. It had lots
21 of other mechanisms in place to punish non-registrants.

22 So you are starting from the proposition
23 that by necessity they wanted to include preconviction
24 felonies. But I guess for those of us who believe in
25 legislative history, and I know many of my colleagues

1 don't believe in it or pay attention to it, there were
2 two bills passed on SORNA, one a House bill that made it
3 very clear, explicitly clear that it applied to
4 pre-SORNA conviction felons; and the Senate bill which
5 under the label Retroactivity had the terms that (d) now
6 has.

7 Doesn't that suggest to us that Congress
8 itself was unsure of whether it wanted to include the
9 pre-SORNA convictions or not?

10 MS. ARBUS SHERRY: I don't think so, and for
11 two reasons. First, to address the bills themselves, I
12 don't think the Senate bill, just like I don't think
13 subsection (b) means that Congress meant to apply the
14 registration requirements to all pre-enactment offenders
15 in the registration provisions and then take away that
16 provision in the specify the applicability provision.

17 In the Senate bill that you are talking
18 about it defined a sex offender as anybody who has been
19 convicted of a sex offense and as this Court said in
20 Carr, that is the language that Congress quite often
21 uses when it intends to include pre-enactment conduct.

22 So I think the verb choice, both in the
23 Senate bill, in the House bill, and in the bill that was
24 actually enacted, indicates that it did intend to
25 include pre-enactment offenders. The other point I

1 would want to make is again, another point that was made
2 in Carr, which is that the registration requirements
3 stand at the very center of Congress's efforts to find
4 and to register the 100,000 missing sex offenders that
5 have fallen off the registry rolls under the previous
6 regime.

7 So I think it is quite clear with respect to
8 SORNA that Congress did want to include pre-enactment
9 offenders; it wanted to not only find those missing sex
10 offenders; it wanted to make sure that they got back on
11 the registry rolls. And as far as of the hundreds of
12 thousands of offenders that were already on the registry
13 rolls when SORNA was enacted, they wanted to make sure
14 that they stayed on the registry rolls, that they kept
15 the information current; they continued to update their
16 information going forward.

17 And again, with respect to pre-enactment
18 offenders that were in prison at the time that SORNA was
19 enacted, it wanted to make sure to get them on the
20 registry rolls before they left prison, before they --

21 JUSTICE SOTOMAYOR: I guess my problem is
22 that you make an assumption, you continue to make an
23 assumption that if the Attorney General hadn't acted --
24 that the Attorney General was incapable of acting
25 quickly.

1 I mean, if the Attorney General had within a
2 few months done what he ultimately did a year later or
3 whatever time period after, had come out and said, it
4 applies; this is what you do; briefly, you register
5 wherever you were convicted or -- et cetera, if you move
6 or change your name, then Congress would have
7 accomplished the goal it wanted.

8 MS. ARBUS SHERRY: If -- if the -- if
9 Congress had wanted the Attorney General to act and to
10 act quickly, presumably Congress would have told the
11 Attorney General that he had to do something. Again,
12 that's something Congress did in many other provisions
13 of SORNA.

14 JUSTICE GINSBURG: And why did -- the
15 Attorney General didn't try to act very quickly, and if
16 the Attorney General thought that SORNA applied from day
17 1, why is the Attorney General trying to go through
18 regulation that said nothing more than SORNA applies?

19 MS. ARBUS SHERRY: Because when the Attorney
20 General issued the interim rule, what he said was that
21 reading it on the face, I do think it applies to
22 everybody, but I recognize the defendants are making an
23 alternative argument and I think it's incredibly
24 important that it apply to everybody, and that it apply
25 to everyone quickly, because we are talking about

1 protecting our communities; we're talking about
2 protecting the public and protecting our children from
3 sex offenders, and having this uncertainty out there is
4 -- is not only not good for protecting the public, but
5 it's not good for sex offenders; it's not good for
6 jurisdictions that are trying to work towards
7 substantial implementation of SORNA.

8 And so I think you could look at it one of
9 two ways. If the idea is, well, Congress left it to the
10 Attorney General, but the Attorney General sort of acted
11 very quickly, I think that suggests that there probably
12 wasn't that much for the Attorney General to do in the
13 first place, and there is little reason that Congress
14 would not have made that decision on its own.

15 To the extent you think there was a whole
16 bunch of things for the Attorney General to do, which
17 again we disagree with, presumably that is something
18 that would take some time. During the interim period
19 those 100,000 sex offenders would remain missing;
20 additional sex offenders would be added to that number
21 and the community and public would continue to be at
22 risk going forward.

23 If there --

24 CHIEF JUSTICE ROBERTS: What if -- what if
25 we think Congress left it to the Attorney General is

1 because they just didn't want to decide? Or some people
2 were saying, this is fine but not retroactive and others
3 were saying it should be retroactive. Do you see any
4 constitutional issues with Congress delegating that
5 authority to the Attorney General, the authority to make
6 the criminal statute applicable on a retroactive basis?

7 MS. ARBUS SHERRY: Of course, we don't think
8 that's what Congress did. So we -- we do think that the
9 notion that Congress would delegate such a fundamental
10 issue to the Attorney General in such subtle and opaque
11 terms that the Attorney General didn't think he needed
12 to do anything is quite significant when you look to see
13 what -- what Congress was intending.

14 JUSTICE SCALIA: It would strengthen your
15 case if you at least acknowledged that it would be
16 constitutionally doubtful. You wouldn't have to say
17 it's bad, but if you said it's doubtful, it might
18 strengthen your case, wouldn't it?

19 MS. ARBUS SHERRY: That is -- that might
20 strengthen our case here --

21 JUSTICE KAGAN: But it would also work
22 against your own interpretation, because your own
23 interpretation allows you to exempt anybody you want
24 from the statute; isn't that right?

25 MS. ARBUS SHERRY: It does, but we do think

1 there's a different starting point. And the different
2 starting point is a fundamental difference, as Your
3 Honor noted. Our argument looks like a lot like
4 prosecutorial discretion, whereas the other starting
5 point is that Congress decided something and left it all
6 to the Attorney General.

7 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

8 Ms. Cain, you have three minutes remaining.

9 REBUTTAL ARGUMENT OF CANDACE CAIN

10 ON BEHALF OF THE PETITIONER

11 MS. CAIN: I would like to address one point
12 the Government made, that there's no need to reregister
13 -- someone in Mr. Reynolds' position -- once they have
14 been registered under State law. They acknowledge the
15 opposite themselves in footnote 12, where they say
16 that -- "that a Government or a State will have been
17 deemed to substantially implement SORNA if it registers
18 pre-enactment and pre-implementation sex offenders who
19 remain in the system as registrants, as well as other
20 people." So it's clear that the Government
21 believes that -- acknowledges that people who are
22 already registered must reregister under SORNA.

23 The most important thing is that this -- the
24 SORNA statute -- the obligation under SORNA begins with
25 initial registration, and does not begin with a State

1 registration. And enactment, Congress knew that certain
2 people would be unable to register under subsection (b),
3 and that is why they enacted subsection (d).

4 We ask the Court to remand to the district
5 court, and to allow Mr. Reynolds to pursue his claim.

6 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

7 The case is submitted.

8 THE CLERK: The Honorable Court is now
9 adjourned until tomorrow at 10:00.

10 (Whereupon, at 12:05 p.m., the case in the
11 above-entitled matter was submitted.)

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